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No. 87-368.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANK OF NEW ENGLAND, N.A.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

REPLY TO BRIEF IN OPPOSITION

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Two points in the Government's Brief in Opposition require brief reply. *First*, the Government defends the trial court's equation of "organizational indifference" with corporate specific intent by asserting that "organizational indifference" is just a new brand of "conscious avoidance," and that "[t]he courts have routinely approved conscious avoidance instructions in criminal cases . . .." Govt. Opp. 10-11. With due respect, this assertion wholly misses the point of the first Question Presented.

Petitioner Bank of New England has never for a moment disputed that an *individual* defendant may be found to have acted with specific intent when he has deliberately closed his eyes or ears to legal obligations. That is, of course, the point of the seven cases the Government cites to support its claim that "conscious avoidance" charges are "routine[ ]" — each and every one of which involved an *individual* as opposed to a corporate defendant. *See* Govt. Opp. 11-12 & n.13. Had this been a conviction of an *individual* defendant for "conscious avoidance," "willful blindness," "deliberate indifference," or the like, no serious question would have been presented.

The question that is worthy of certiorari here is *not* whether an *individual* may be convicted of a specific intent crime on the basis of his own "'deliberate indifference'" (*see* Govt. Opp. 11), but rather whether a *corporation* may be convicted of a specific intent crime on the basis of its "*organizational* indifference." This is a question of importance not only to the Bank of New England in this case, but to every corporation that may face charges of any crime for which Congress has required specific intent.

This question cannot be resolved by simple analogy to cases involving individual defendants, as the Government would have it. For unlike Messrs. Lanza, Schiff, Schaffer, Hathaway, Boyer, Demauro, and Gold — the individual human defendants in the cases stressed by the Government (Govt. Opp. 11-12 & n.13) — a corporation cannot deliberately wink at, blind, or deafen itself to its legal obligations. Unlike Messrs. Lanza, Schiff, Schaffer, Hathaway, Boyer, Demauro, and Gold, a corporation has no eyes or ears to close.[1]

[1] The Government does make brief mention of one case that did involve a corporation, *United States* v. *Illinois Central R.R.*, 303 U.S. 239 (1938) (cited at Govt. Opp. 12). But that case provides no guidance here. In that case, the Court did hold that a railroad's "indifference" was enough to show "willful" violation of a statute requiring railroads to unload cattle quickly from their trains. As this Court has noted, however, the term "willful" does not mean the

Nor can the question be resolved by treating the instruction on "organizational indifference" as a vicarious liability instruction. Quite plainly it was not. The trial court *did* give a vicarious liability instruction, in which it stated that the Bank could be found to have acted willfully "if one of its employees in the scope of his employment acted willfully." Pet. App. A38. Petitioner of course concedes that such vicarious liability may be imposed — whether the employee has acted willfully *or* been willfully blind. Had the instruction stopped there, the first Question in the Petition would never have been presented. The first Question is presented only because the trial court went on to give its novel *corporate* "conscious avoidance" and *corporate* "organizational indifference" instructions as a wholly separate and independent basis for conviction — one ex-

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same thing in every federal statute, and "[a]id in arriving at the meaning of the word 'willfully' may be afforded by the context in which it is used." *United States* v. *Murdock*, 290 U.S. 389, 395 (1933).

There can be no serious argument that Congress meant "willfullness" in the context of $100 to $500 fines for livestock safety infractions to mean the same thing as "willfulness" in the context of CTR crimes, for which it imposed fines a hundred times greater and substantial prison terms. *First*, as this Court stated in *Illinois Central* itself, far more is required to show "willfulness" in crimes "involving turpitude" than in those involving railway safety and the like, where mere employee "negligence or oversight" may be enough to support a finding of corporate "willfulness." 303 U.S. at 242, 244. *Second*, the very lower court decisions favorably cited by the Government have expressly reiterated this point. *See, e.g.*, *Riss & Co.* v. *United States*, 262 F.2d 245, 249 (8th Cir. 1958) (noting that "willful" truck driving infractions may rest on a showing of mere "indifference," but "willful" tax evasion may not); *United States* v. *T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 740 (W.D. Va. 1974) (same) (both cases cited at Govt. Opp. 10 n.12). *Finally*, the lower courts have unanimously held that felony violations of the currency transaction reporting laws, like tax crimes, are plainly crimes of the "turpitude" rather than the "public safety" type, as the Government nowhere attempts to deny. *See* Cert. Pet. 7-8 & n.10 (citing lower court cases), 10-11. Accordingly, the Government's weak attempt (*see* Govt. Opp. 12 & n.14) to equate this case with a cattle-car case must fail.

pressly "[a]lternative[ ]" to vicarious liability.[2] No plausible reading of the challenged instruction could reduce it to one about imputing individual employees' own "indifference" or "avoidance" to the corporation.[3]

Precisely because a corporation is *not* an individual, the trial court's invitation to the jury to convict the Bank for "organizational indifference" amounted to an invitation to convict the Bank for negligence. Congress's limitation of criminal punishment under the currency transaction laws to cases of specific intent, however, contemplated no such thing. The First Circuit's judgment affirming conviction under that instruction accordingly requires review by this Court.

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[2] After the unchallenged instruction on vicarious liability (Pet. App. A38), the trial court stated:

> *Alternatively*, the bank *as an institution* has certain responsibilities; *as an organization*, it has certain responsibilities. And you will have to determine whether the bank *as an organization* consciously avoided learning about and observing C.T.R. requirements. The Government to prove the bank guilty on this theory, has to show that its failure to file was the result of some flagrant *organizational* indifference.

Pet. App. A39 (emphasis added). It is only this latter, alternative instruction that Petitioner contests.

[3] The Government suggests that any error in this instruction was cured by the trial court's boilerplate language at the beginning of the instructions on willfulness. *See* Govt. Opp. 12-13. Because those stock phrases occurred some eight pages of transcript and three defendants earlier in the charge, the Government's contention can hardly be taken seriously.

The Government also attempts to trivialize the trial court's supplemental instruction (*see* Govt. Opp. 9-10 n.11), which reduced the threshold of intent still lower, from "flagrant" to "plain[ ]" indifference (Pet. App. A40). But as Justice Frankfurter wrote for this Court, a trial court's supplemental instruction in response to a juror's question is critical, for "in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating charge . . . ." *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946).

The *second* point in the Government's opposition brief that requires reply is the wholly unfounded assertion that the language of 31 U.S.C. § 5322(b) is "plain" about how many felonies a "pattern" involves. *See* Govt. Opp. 13-14 & n.15. That statute is in fact undeniably ambiguous on that point.[4] The Government makes the statute "plain" only by misquoting it.

Contrary to the Government's contention, the "plain language" of § 5322(b) does *not* "proscribe[ ] '*violations*' of the Bank Secrecy Act" that are part of a pattern. Govt. Opp. 13 (emphasis added). And likewise contrary to the Government's contention, nothing in the "plain language" of that statute makes "the individual *violation* . . . the focus of the proscription." *Id.* For § 5322(b) nowhere uses the term "*violation*" at all. Rather it states, in full, that:

> (b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

The statute thus simply does not say, as the Government would have it, that each "violation" in a pattern is an offense warranting a separate fine of up to half a million dollars. Nor, of course, does it say that each "pattern" is such an offense. Instead, it is ambiguous. It says that "[a] person willfully violating" the CTR laws "as part of a pattern" is liable for such an offense, but it does not say how many times over. It leaves that question open.

[4] Notwithstanding the Government's vague suggestion (*see* Govt. Opp. 16), the statute's amendment in 1986 (described fully at Govt. Opp. 3 n.3) made no dent whatever in this ambiguity.

Accordingly, contrary to the Government's argument (*see* Govt. Opp. 13-14), the rule of lenity should apply here in full force (*see* Cert. Pet. 6-7, 16). Just as in baseball, ties go to the runner, in the criminal law, "ambiguity should be resolved in favor of lenity." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). As Justice White observed for this Court just last Term, "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 107 S. Ct. 2875, 2881 (1987). Congress has not so spoken here. Neither prosecutors nor lower federal courts are free to speak for it.[5]

The lower court thus violated principles not only of due process and fair warning, but also of the separation of powers, when it read the harshest possible unit of punishment into the ambiguous silence of 31 U.S.C. § 5322(b).[6] Only this Court's

[5] The Government suggests that the division among the circuits described in the Petition (Cert. Pet. 13-14) can be ignored because the circuit courts were not announcing "general rule[s]" (Govt. Opp. 16), but were simply ratifying acts of widely disparate prosecutorial discretion (*see* Govt. Opp. 15, noting that the "question [was] whether the government was free" to charge multiple felonies). This proposition cannot be accepted. For criminal punishment can no more be imposed under an ambiguous statute by shifting Congress's responsibilities to the executive branch than it can by shifting them to the courts. *Cf. City of Houston* v. *Hill*, 107 S. Ct. 2502, 2511 & n.15 (1987).

[6] The Government's and the lower court's reading of the statute was a full order of magnitude harsher than the reading of the statute urged by Petitioner. Under 31 U.S.C. § 5322(a) at the time at issue in this case, a single willful CTR violation was a misdemeanor punishable by a fine of no more than $1000. Thus had the Bank been convicted of thirty-one unrelated violations, it would have been liable for no more than a $31,000 fine. If § 5322(b) is read to subject "pattern" violators to a single felony violation, the less harsh reading, then the Bank's maximum fine for a "pattern" of thirty-one violations would have been multiplied 16 times to $500,000 — a quite substantial enhancement, by any standard. But if § 5322(b) is read in the harshest possible way, as the Government and both courts did below, then the maximum fine for thirty-one violations is multiplied not 16 but 500 times, from $31,000 to over $15 million. The legislative history supports a view that Congress wanted substantial enhancement for "serious violations" involving "large sums of money" (*see* Cert. Pet. 14), but the Government can point to no evidence that Congress had such draconian enhancement in mind.

review can restore the task of clarification from the lower federal courts to the Congress, where it belongs.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari, and in this Reply, this Court should review and reverse the decision of the court of appeals.

Respectfully submitted,

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